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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LOU ARMANDO ESTRADA, Defendant and Appellant.	E055988 (Super.Ct.No. RIF1100221) OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner, Judge. Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and A. Natasha Cortina and Kimberley A. Donohue, Deputy Attorneys General, for Plaintiff and Respondent.

On March 5, 2012, a jury convicted defendant and appellant Lou Armando Estrada of the following: Two counts of forcible child rape (counts 1 and 2; Pen. Code, [1] §§ 261, subd. (a)(2), 269, subd. (a)(1)); four counts of forcible child sodomy (counts 13, 14, 15, and 30; §§ 286, 269, subd. (a)(3)); 21 counts of lewd and lascivious act upon a child under the age of 14 years (counts 4, 5, 6, 7, 8, 9, 10, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29; § 288, subd. (a)); two counts of contacting a minor to encourage child pornography (counts 11 and 31; §§ 288.3, subd. (a), 311.4, subd. (c) or 311.11); one count of possessing child pornography (count 12; §§ 311.11, subd. (a), 311.4, subd. (d)); and two counts of persuading a minor to engage in sexual conduct for the purpose of preparing an image (counts 32 and 33; § 311.4, subd. (c)). The jury also found true an allegation that defendant committed these offenses against more than one victim (§ 667.61, subd. (e)(4)).[2] The trial court sentenced defendant to state prison for a determinate term of five years and an indeterminate term of 405 years to life. He appeals, contending: (1) his convictions (counts 11 and 31) pursuant to section 288.3, subdivision (a), for contacting a minor to encourage pornography, should be reversed because they are necessarily lesser included offenses of his convictions (counts 32 and 33) pursuant to section 311.4, subdivision (c), for encouraging child pornography; (2) nine of his

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Section 667.61 was amended in 2010 in minor ways and partially renumbered. (Stats. 2010, ch. 219, § 216.) The information references subdivision (e)(5) instead of subdivision (e)(4). At the time of defendant's offenses, the multiple victim circumstance was articulated in subdivision (e)(5), which is now subdivision (e)(4). For purposes of this opinion, we will refer to the new subdivision (e)(4).

sentences should have been stayed pursuant to section 654; and (3) because the information improperly pled the existence of the multiple victim circumstance (§ 667.61), the trial court's imposition of 27 consecutive sentences of 15 years to life was unauthorized.

I. FACTS

Beginning in 2008, defendant's girlfriend, Rosa, moved into defendant's home with her five children from a previous relationship: Jane Doe 3 (age 11); Jane Doe 1 (age 9); Jane Doe 2 (age 8); and two younger children—two older daughters and a son who was 15 1/2 years old at the time of trial. Defendant had three older children from a previous relationship. Rosa did not work. Defendant worked in his construction and electrical company. The blended family lived in three different homes.

A. Jane Doe 1 (Doe 1)

Rosa's second oldest daughter, Doe 1, was sexually abused by defendant so frequently that "it didn't seem like it was not normal anymore." The abuse began about six months after the family moved in together. On Rosa's birthday, defendant and Doe 1 went to pick up a birthday cake; however, they stopped at defendant's mother's home, where he told Doe 1 to take off her clothes and then inserted his penis in her vagina "a little bit" and touched her breasts. She tried to push him away but he used physical strength.

About Christmas, while Rosa was out, defendant made Doe 1 go into his walk-in closet, where he told her that he was going to put his penis in her vagina. She did not try to get away because "he would tell me that he would put a good hurt on [me] if I ever

told anyone." They ended up lying on the floor, where defendant kissed her on the lips, "tongue touching tongue," and attempted to put his penis in her vagina.

On another occasion, defendant had Doe 1 lie on her back on the bed and he inserted his penis in her vagina. She recalled, "I was [lying] down, like, only on my back was [lying] down on the bed. And, like, all I remember was him, like, I felt, like, something hurt, and then he was, like, it's almost in, and then that's it."

Doe 1 stated that she did not try to get away from defendant because she was afraid of him. She tried to tell defendant "no" and refuse his demands, but he would get mad, would not speak to her for a few days, or would take his anger out on her little brother or her family. However, if she complied with his demands, he would be better. At times, she was able to push him away, but other times he used his body weight to prevent her from pushing him away. As Doe 1 described, "He's, like, three times bigger than me." On more than five occasions, Doe 1 was unable to prevent defendant from putting his penis inside her vagina. She stated that during the time she lived with defendant, he touched his penis to her vagina more than 30 times.

Defendant masturbated in front of Doe 1. One time, he indicated that he wanted her to touch his penis, and while showing her what to do, "white stuff started coming out." On another occasion, he masturbated in front of her, and he ejaculated on the floor and on her shorts, which were pulled halfway down her thighs. Another time, his semen landed on her pants and she left the room to wash it off. Defendant had Doe 1 use her hands to masturbate him. On more than five occasions he touched her bare breasts. When he touched them, he would do other things to her body. He also touched her

vagina with his hands, inserting his finger in her vagina more than 10 times. He touched her anus with his penis at least three times.

Defendant used his mouth to touch Doe 1's breasts more than five times and her vagina more than 10 times. She described one time when she was lying on the bed and he had pulled her pants down: "[H]is mouth started going towards my vagina. [¶] . . . [¶] I guess he licked my vagina with his tongue." Because Doe 1 was afraid of defendant, she did not try to get away.

Defendant bought Doe 1 a cell phone and told her not to tell her mother about it. He told her to send him sexual messages, pictures and videos of herself. Before Christmas 2010, defendant told the family there was not going to be a Christmas; however, he secretly told Doe 1 that it was because she "didn't do what he was telling [her] lately," i.e., making videos, photographing herself, and letting him put his penis in her vagina. Afraid that her family would not have a Christmas because of her, she complied with defendant's demands.

B. Jane Doe 2 (Doe 2)

Doe 2 was eight when defendant began sexually abusing her. It began in the TV room while she was massaging defendant's head. He began whispering something, which she did not understand, and then he touched her breast over her clothes. She did not tell anyone because she was afraid. One time when she was in the master bedroom watching TV, defendant came in and started touching her breast and buttocks over her clothing. Doe 2 did not feel like she could get away. He touched her bare breasts at least two times.

On one evening, defendant told Doe 2 to go outside with him. When they were outside, he pulled down his pants and underwear and started masturbating in front of her. He told her to put his penis in her mouth, but she refused. He persisted with his demands and got mad that she continued to refuse. He eventually pulled up his pants and they went back inside the house.

Defendant inserted his penis into Doe 2's anus at least eight times. On one occasion, he had her lie on her stomach on the bed. She said that when he did this, it was "painful." On another occasion when he did the same thing while she was lying on her stomach on the bed, she said she was nervous, and "it felt, like, a little bit, like, worse, but I got, like, that feeling almost like there's something wrong." She wanted to scream, but was afraid that something "would happen" if she did. When she tried to scream on another occasion, defendant covered her mouth with his hand.

Defendant also put his penis in Doe 2's mouth. One time, Doe 2 was called to defendant's bedroom. When she got there, he was standing up, pulled down his pants, had her get on her knees, "[a]nd I don't know how it went inside my mouth, but I remember it went inside." She was uncomfortable and knew it was wrong, but she was afraid if she told her mother, her mother would not believe her.

Defendant inserted his finger in Doe 2's vagina on more than five occasions. Once, when she was in defendant's bedroom, he took off her pants and inserted his finger into her vagina and began "rubbing" inside of it. She recalled that it hurt most of the time, but then it felt weird. Defendant would kiss her on the mouth, using his tongue. It was the first time that anyone had put their tongue in her mouth. He also used his tongue

on her vagina more than five times. Once while she was watching TV in his bedroom, he came in, took her pants off, and put his mouth "in my vagina." She unsuccessfully attempted to push him away. He eventually stopped and she left the room.

Defendant would get upset with Doe 2 if she did not comply with his demands. When he was upset, he would not talk to her, which made it more difficult for her to go over to her friends' houses. He also told her that he would "F [her] up" if she did not do what he said.

Doe 2 kept a calendar on which she would mark a "sad face on the days that he would do stuff" to her. When defendant found the calendar, he destroyed it.

C. Jane Doe 3 (Doe 3)

Doe 3 is Rosa's oldest daughter. She stated she was 11, or "in the early 12's," when defendant began sexually abusing her. He approached her under the premise of teaching her about "how to take care of [her]self." In doing so, he pulled down his pants and underwear, exposing his penis to her. He then pulled Doe 3's pants down and touched his penis to her vagina. After he stopped, defendant left the room and went to his bathroom. Doe 3 felt awkward and embarrassed. Defendant touched his penis to her vagina at least four times. When she told him that it made her uncomfortable, he told her "just one more time and then I'll stop." But he never stopped.

Defendant attempted to put his penis in Doe 3's vagina at least three times. On one occasion, he attempted for at least 15 minutes. During this incident, defendant lifted Doe 3's shirt and bra and began licking her breasts. He ultimately ejaculated on her leg. He also tried, and was able, to insert his penis in her anus at least two times. On one

occasion, Doe 3 was leaning over the bed. He inserted his penis and then moved it back and forth. She felt very uncomfortable.

Defendant licked Doe 3's vagina on at least three occasions. He also licked her breasts at least twice. Defendant used his hands to touch her vagina, as well, on multiple occasions—both over and under her clothing. Defendant "French kissed" her several times. Even when defendant stopped placing his penis in her vagina or anus, he continued to demand that she take sexually explicit photos and videos of herself and send them to him.

D. Sexually Explicit Text Messages, Photographs and Videos

Defendant took pictures of each of the girls and asked Doe 1 and Does 2 to take sexually explicit pictures of themselves. He told Doe 1 and Doe 3 to take videos of themselves while naked. To facilitate this, he purchased cellular phones for them and provided a camcorder to record videos.

1. Doe 1 Photographs and Videos

Defendant bought Doe 1 a cell phone, told her not to tell Rosa, and added his number to the phone, using the name "Willy," the same name that he nicknamed his penis, to identify himself. Defendant sent Doe 1 sexually explicit text messages on her phone, starting approximately one week after he gave her the phone. He also told Doe 1 to take sexually explicit photographs and videos of herself using the phone. She took at least four photos of herself naked, and she started taking videos while naked and, at defendant's direction, talked to the videos as if "I'm talking to Willy." She referred to her vagina in some of the videos as "Muffin," defendant's nickname for it. After making

the videos, Doe 1 would leave the camcorder in her dresser, where defendant would retrieve it early in the morning or late in the night. Defendant sent photos and videos of himself to her. Initially, she did not always watch them, but when defendant would ask her questions about them, she began to watch so that she could answer his questions.

2. Doe 2 Photographs

Defendant took photos of Doe 2's naked body. On one occasion, he lifted up her bra to photograph her breasts. At the same time (or within 2 minutes) he took photos of her vagina and her buttocks.

3. Doe 3 Photographs and Videos

Defendant told Doe 3 to take photos and videos of her buttocks, vagina and breast, and to send them to him. She would take pictures of herself with her phone, send them to defendant's phone, and then delete them from her phone. Initially, he asked her to take videos of herself with his old phone and leave it by his bed; however, he eventually provided her with a video recorder to take the videos. Once she began making the videos, the touching became less frequent. Defendant sent Doe 3 videos of himself masturbating. In some of the videos, he referenced "cherry pie," the nickname he gave Doe 3's vagina.

E. Police Investigation

On January 14, 2011, Rosa found a cell phone in Doe 1's dresser. She looked at the text message in the phone and found one from "Willy," which she noted was defendant's phone number, and it referenced "bon bons." Rosa, who did not speak English fluently, showed Doe 3 the message and asked what the word "bon bons," or

"boom boom," meant. When Doe 3 mentioned something about defendant trying to touch Doe 1, Rosa confronted Doe 1. Doe 1 confirmed to her mother that defendant would send text messages to her and that he had touched her. Rosa told Doe 3 to call 911. After Rosa and the girls were interviewed, defendant was arrested and charged with various sexual offenses.

F. The Defense

Defendant testified and denied committing any sexual offense with the girls. He claimed that Doe 1 and Doe 3 texted him the pictures and videos of themselves on their own. He stated that he saved the videos on a disk drive, a thumb drive, and his computer so he could "confront" the girls about their behavior and to show Rosa. Later the next day he was arrested. He testified that he did not remember calling out the names of Doe 1 or Doe 3 in the videos he made of himself masturbating, because he was "in the zone," but that he regretted it once he saw the videos and heard what he was saying. He admitted that Doe 1 and Doe 3 aroused him as he was masturbating in his videos. He claimed the same pictures that Doe 2 identified as pictures of her naked body (including one with defendant's hands on female buttocks and one with a female wearing a pink polka dot bra) were actually pictures he took of a 45-year-old woman with whom he was having an affair. He claimed the girls were making up their stories because he had given their mother two months to move her family out of the house.

II. ARE SECTION 288.3, SUBDIVISION (a) OFFENSES LESSER INCLUDED OFFENSES OF SECTION 311.4, SUBDIVISION (c)?

Defendant contends his convictions pursuant to section 288.3, subdivision (a) for contacting a minor to encourage pornography (counts 11 and 31) should be reversed because they are necessarily lesser included offenses of his convictions (counts 32 and 33) pursuant to section 311.4, subdivision (c), for encouraging child pornography. We disagree.

A. Applicable Legal Standard

In California it has long been held that multiple convictions may not be based on necessarily included offenses. (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) This is a judicially created exception to section 954, which expressly allows a defendant to be convicted of "'any number of the offenses charged.'" (*People v. Ramirez* (2009) 45 Cal.4th 980, 984; see also *People v. Ortega* (1998) 19 Cal.4th 686, 692.) When multiple convictions are based on necessarily included offenses, the conviction for the greater offense is controlling, and the conviction for the lesser offense must be reversed. (*People v. Pearson*, *supra*, at p. 355.)

"There are two tests for determining whether one offense is necessarily included in another: the 'elements' test and the 'accusatory pleading' test. [Citation.]" (*People v. Ramirez*, *supra*, 45 Cal.4th at pp. 984-985.) Both tests are used in determining whether a defendant received adequate notice of the charges against him and may therefore be convicted of an uncharged crime, but only the elements test is used in determining whether a defendant may be convicted of multiple charged crimes. (*People v. Reed*

(2006) 38 Cal.4th 1224, 1229-1230; see also *People v. Scheidt* (1991) 231 Cal.App.3d 162, 165-166, 168-171 [observing that "only a statutorily lesser included offense is subject to the bar against multiple convictions in the same proceeding"; explaining the origins and reasons underlying the judicially-created bar against multiple convictions based on necessarily included offenses].)

Under the elements test, we look strictly to the statutory elements of the offenses, not to the facts of the case. (*People v. Ramirez, supra,* 45 Cal. 4th at p. 985.) We ask whether "'"all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense." [Citation.]' [Citations.]" (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) In other words, "if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former. [Citations.]" (*Ibid.*; see also *People v. Montoya* (2004) 33 Cal.4th 1031, 1034.)

B. Analysis

As relevant here, section 311.4, subdivision (c), punishes anyone who, "with knowledge that a person is a minor under the age of 18 years . . . knowingly promotes, employs, uses, persuades, induces, or coerces a minor under the age of 18 years, or any parent or guardian of a minor under the age of 18 years under his . . . control who knowingly permits the minor, to engage in . . . either posing or modeling . . . for purposes of preparing any . . . image, including, but not limited to, any . . . photograph . . . [or] videotape . . . involving, sexual conduct by a minor . . . ." Section 311.4 was enacted as "part of a statutory scheme '"to combat the exploitive *use* of children in the production of

pornography."' [Citation.] The statute is 'aimed at extinguishing the market for sexually explicit materials featuring children.' [Citation.] The Legislature was particularly concerned 'with visual displays such as might be found in films, photographs, videotapes and live performances,' and section 311.4 thus 'prohibits the *employment or use of a minor* . . . in the production of material depicting that minor in "sexual conduct."' [Citation.]" (*People v. Cochran* (2002) 28 Cal.4th 396, 402, italics added, overruled on other grounds as stated in *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12.) Thus, the purpose of section 311.4 is to punish the exploitive use of children in pornography. (*People v. Cochran*, *supra*, at p. 402.)

In contrast, section 288.3, subdivision (a), punishes anyone "who contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with the intent to commit an offense specified in Section . . . 311.4 . . . ." Section 288.3, subdivision (b) defines "contacts or communicates with" as including "direct or indirect contact or communication that may be achieved personally or by use of an agent or agency, any print medium, any postal service, a common carrier or communication common carrier, any electronic communications system, or any telecommunications, wire, computer, or radio communications device or system."

The difference between these two statutes is that section 288.3, subdivision (a), requires the defendant to contact or communicate (or attempt to do either) with a minor. Although a defendant may violate section 311.4, subdivision (c) by contacting or communicating with a minor in order to cause the minor to participate in the production

of pornography, it is not a requirement. For example, in *People v. Hobbs* (2007) 152 Cal.App.4th 1, 4 [Fourth Dist., Div. 2], this court affirmed a conviction under section 311.4, subdivision (c), where the defendant surreptitiously set up a video camera in a girls' locker room to film children between the ages of eight and 18 changing in and out of their bathing suits. We rejected the defendant's claim that he could not be guilty of violating this statute unless he personally interacted with the children. (*People v. Hobbs*, *supra*, at pp. 5-6.) Here, defendant's argument presumes he must have contact or communication with a minor in order to encourage child pornography and be convicted of section 311.4, subdivision (c). We disagree. As illustrated in *People v. Hobbs*, *supra*, a violation of section 311.4 occurs with or without contact or communication.

Furthermore, we reject defendant's contention that "there be some minimal level of interaction between defendant and the minor such that the minor as a result of the communicative content of that interaction ends up 'posing or modeling.'" If that were the case, there would be no use for the language in section 311.4 "or any parent or guardian of a minor under the age of 18 years under his . . . control who knowingly *permits* the minor, to engage in . . . either posing or modeling . . . ." (§ 311.4, subd. (c), italics added.) As we observed in *People v. Tompkins* (2010) 185 Cal.App.4th 1253, 1264 [Fourth Dist., Div. Two], a violation of the statute occurs by "knowingly *permitting* a minor to engage in or assist others to engage in posing or modeling for purposes of preparing representation of sexual conduct. [Citations.]" Here, defendant's role is unclear. However, the evidence establishes that he was in a romantic/physical relationship with the victims' mother, that the victims and their mother had moved into

his home to live with him, and that the mother and the victims financially depended upon defendant. Thus, it appears that he occupied a guardian, almost parental, position with respect to the girls.

Applying the elements test, we conclude that a defendant may violate section 311.4, subdivision (c), without violating section 288.3, subdivision (a). Therefore, we hold that section 288.3, subdivision (a), is not a lesser included offense of section 311.4, subdivision (c).

III. SECTION 654

Defendant contends that nine of his sentences should have been stayed pursuant to section 654. He first contends the trial court should have stayed punishment "on all but two of [his] . . . sections 288.3, 311.4 and 311.11 convictions—one for each victim—because they were parts of a single course of conduct with respect to each victim." He then contends that six of his sentences for lewd acts upon a child (§ 288, subd. (a)) should be stayed in favor of the sentences imposed for "'the forcible sex crimes'" (including child rape, §§ 261, subd. (a)(2) and 269, subd. (a)(1)) and forcible child sodomy, §§ 286 and 269, subd. (a)(3)). He argues "there is no way to tell on this record whether the jurors convicted [defendant] of the six forcible sex crimes and then turned around and used those very same acts to convict [him] of six of the charged lewd acts."

A. Standard of Review

Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or

omission be punished under more than one provision." (§ 654, subd. (a).) "The section 'applies when there is a course of conduct which violates more than one statute but constitutes an indivisible transaction.' [Citation.] Generally, whether a course of conduct is a divisible transaction depends on the intent and objective of the actor: 'If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.] [¶] However, the rule is different in sex crime cases. Even where the defendant has but one objective—sexual gratification—section 654 will not apply unless the crimes were either incidental to or the means by which another crime was accomplished. [Citations.] [¶] But, section 654 does not apply to sexual misconduct that is 'preparatory' in the general sense that it is designed to sexually arouse the perpetrator or the victim. [Citation.] That makes section 654 of limited utility to defendants who commit multiple sex crimes against a single victim on a single occasion. As our Supreme Court has stated, '[M]ultiple sex acts committed on a single occasion can result in multiple statutory violations. Such offenses are generally "divisible" from one another under section 654, and separate punishment is usually allowed. [Citations.]' [Citation.] If the rule were otherwise, 'the clever molester could violate his victim in numerous ways, safe in the knowledge that he could not be convicted and punished for every act.' [Citation.] Particularly with regard to underage victims, it is inconceivable the Legislature would have intended this result. [Citation.]" (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006.)

"We apply a substantial evidence standard of review when determining whether section 654 applies. 'The determination of whether there was more than one objective is

a factual determination, which will not be reversed on appeal unless unsupported by the evidence presented at trial.' [Citations.]" (*People v. Kurtenbach* (2112) 204 Cal.App.4th 1264, 1289.)

B. Contacting a Minor to Encourage Pornography, Encouraging Child Pornography, and Possession of Child Pornography Convictions

Defendant was convicted of two counts of contacting a minor to encourage child pornography (§ 288.3, subd. (a)), two counts of persuading a minor to produce child pornography (§ 311.4, subd. (c)), and one count of possession of child pornography (§ 311.11, subd. (a)). At sentencing, the trial court imposed a total determinate sentence of five years for these five convictions, imposing a sentence of three years for the violation of section 311.11, subdivision (a), the principal count, four months for each violation of section 288.3, subdivision (a), and eight months for each violation of section 311.4, subdivision (c), each to run consecutively.

According to the record before this court, defendant provided Doe 1 and Doe 3 with cell phones. Initially, he demanded they take photos of themselves. Later he demanded that they take pornographic videos of themselves. In addition, he sent sexual text messages to them, along with sexual videos of himself. Later, defendant downloaded those pornographic images onto disk and thumb drives for his personal use, and he also e-mailed some of them from his cell phone to his email account. As the People point out, the fact that Doe 1 and Doe 3 provided defendant with multiple photographs and multiple videos shows that he demanded the images from the victims on multiple occasions. When defendant became upset about not getting a video from Doe 1 in a timely manner,

she apologized. When he did not like the brevity of her videos, he told her to make them longer. These frustrations were expressed after the initial demand to make the videos.

Over the course of two and a half years, time and place separated defendant's multiple acts upon the victims, enabling him to reflect and renew his intention to commit a crime. Each crime was separate and distinct, and none was necessary to accomplish the others. While defendant asserts that he "harbored a single criminal intent in committing the crimes against each victim," we conclude that his "attempts to achieve sexual gratification by committing a number of base criminal acts . . . is substantially more culpable than a defendant who commits only one such act." (*People v. Perez* (1979) 23 Cal.3d 545, 553.) Moreover, the People note that defendant possessed pornographic pictures of Doe 2 (violation of section 311.11, subdivision (a)); however, she was not named as a victim under sections 288.3, subdivision (a) or 311.4, subdivision (c), and thus, defendant's possession of these images is separate from his possession of images of Doe 1 and Doe 3. (*People v. Beamon* (1973) 8 Cal.3d 625, 638, fn. 10 [multiple victim exception to prohibition against multiple punishment under section 654].)

C. Lewd Acts and Forcible Sex Crimes Convictions

Defendant was convicted of two counts of child rape (§§ 261, subd. (a)(2) and 269, subd. (a)(1)), four counts of child sodomy (§§ 269, subd. (a)(3) and 286), and 21 counts of lewd and lascivious act upon a child (§ 288.3, subd. (a)). The jury found true the allegation that defendant committed these crimes against multiple victims. (§ 667.61, subd. (e)(4).) The trial court sentenced defendant to 15 years to life for each of these convictions, with each sentence to run consecutively.

In making its sentencing choice, the trial court stated, "I found these crimes were predominantly independent of each other, occurring over a long period of time; crimes in this Court's opinion that reflect emotional violence to the victim that is almost unimaginable; and that I found that the different times that these events occurred were not reflective of a single period of aberrant behavior." As the People point out, Doe 1 testified to at least 33 lewd acts in addition to the two instances of child rape; Doe 2 testified to at least 12 lewd acts in addition to the three instances of sodomy; and Doe 3 testified to at least 17 lewd acts in addition to one instance of sodomy. However, defendant contends the jury may have convicted him of the forcible sex crimes and used those very same acts to convict him of the lewd acts. Citing *People v. Coelho* (2001) 89 Cal.App.4th 861, 883 (*Coelho*), he argues "'a jury may proceed chronologically through the acts shown and, when they run out of counts to convict the defendant of committing, stop considering any other acts.'" Here, he claims "the prosecution specifically invited the jurors to convict [him] of the six forcible sex crimes based on the same acts it[] used to convict [him] of lewd and lascivious behavior." We reject defendant's argument.

As the People aptly point out, *Coelho* did not involve section 654. The *Coelho* analysis focused on the means for identifying the factual basis of each conviction in the context of determining whether a recidivist provision for mandatory consecutive sentences is applicable. (*Coelho, supra*, 89 Cal.App.4th at pp. 879-884.) The analysis is premised on the defendant's constitutional right to a jury trial, (*Id.* at pp. 874-876) and the determination is necessary because, for sentencing purposes, the trial court may rely only on the facts that actually formed the basis for the jury's verdict. (*Id.* at p. 876.)

However, the right to a jury trial does not apply to statutes, such as section 654, which mitigate punishment. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 269-271.) Thus, *Coelho* is irrelevant to the present analysis. (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1339, fn. 6.) Section 654 is simply "a discretionary benefit provided by the Legislature to apply in those limited situations where one's culpability is less than the statutory penalty for one's crimes." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1022.) "[I]n the absence of some circumstance 'foreclosing' its sentencing discretion . . . a trial court may base its decision under section 654 on *any* of the facts that are in evidence at trial, without regard to the verdicts." (*People v. McCoy*, *supra*, at p. 1340.)

Based on the above, section 654 did not bar separate punishment for each count.

IV. MULTIPLE VICTIM CIRCUMSTANCE

The prosecution charged defendant with 33 substantive sex offenses, 28 of which were subject to one strike sentencing. The last paragraph in the information, which immediately followed the recitation of the 33 counts (without any heading or demarcation separating it and the 33 counts), contained the only one-strike allegation. The prosecution alleged that "in the commission and attempted commission of the above offenses, the defendant . . . has been convicted in the present case of committing an offense, to wit: 288, subdivision (a), or 269 (a)[,] against more than one victim, within the meaning of Penal Code section 667.61, subdivision (e), subsection ([4][3])." According to defendant, this sole paragraph alleging the multiple victim circumstance pursuant to

[3] See footnote 2.

section 667.61, subdivision (e)(4), coupled with the fact that the language in the paragraph "did not state that it applied to the appropriate subset of 28 counts[,]"means the "charging document did not seek multiple one-strike terms. It sought just one." He argues that it "makes absolutely no sense to infer from the prosecution's charging language that it was seeking one-strike sentencing on every eligible count." Likewise, defendant contends the prosecution failed to prove more than a single one-strike allegation because "the jury verdict in this case includes a finding that [defendant], 'during the commission of counts 1 through 33 . . . did commit an offense against more than one victim within the meaning of Penal Code section 667.61, subdivision (e), subsection (5).'" Thus, defendant challenges the trial court's imposition of 27 consecutive 15 years-to-life sentences as being unauthorized.

A. Relevant Law

Section 667.61 "sets forth an alternative and harsher sentencing scheme for certain enumerated sex crimes perpetrated by force . . . ." (*People v. Mancebo* (2002) 27 Cal.4th 735, 741, fns. omitted.) Those sex crimes include rape (§ 261), sodomy (§ 286), and lewd and lascivious act involving children (§ 288, subd. (a)), where a jury also finds that the defendant committed one of those enumerated offenses against multiple victims. (§ 667.61, subds. (b), (c), & (e)(4).) This statute is referred to as the "One Strike scheme" because it imposes a potential life term sentence for certain crimes involving certain circumstances, regardless of defendant's prior criminal history. In relevant part, it applies "only if the existence of any circumstance specified in subdivision . . . (e) is alleged in the accusatory pleading pursuant to this section, and is either admitted by the

defendant in open court or found to be true by the trier of fact." (§ 667.61, subd (o) [formerly subd. (j)].)

B. Analysis

Defendant's argument is not persuasive for several reasons. First, as the People point out, the statute does not prescribe where in the information or the frequency with which the allegation must appear. Had the Legislature intended the enhancement under section 667.61 to be specifically pled as to each count the prosecution sought to enhance, it knew how to say so. Subdivision (o), provides: "The penalties provided in this section shall apply only if the existence of any circumstance specified in subdivision (d) or (e) is alleged in the accusatory pleading pursuant to this section, and is either admitted by the defendant in open court or found to be true by the trier of fact." (§ 667.61, subd. (o).) The Legislature could have simply added the following language: The facts that give rise to the penalties in this section "'shall be added to and be a part of the count or each of the counts of the accusatory pleading . . . .'" (*People v. Riva* (2003) 112 Cal.App.4th 981, 1002-1003 [discussing former sections 12022 and 12022.5].) The absence of this, or similar language, strongly suggests the Legislature did not intend such strict pleading requirements with respect to section 667.61. (*People v. Riva*, *supra*, at p. 1003.) Second, the jury's finding explicitly refers to counts 1 through 33. Because no one count specifically alleged there were multiple victims, by necessity, more than one count would need to be involved in the section 667.61 verdict in order to make sense of the multiple victim finding. Third, because the allegation itself specifically limits its application to "[section] 288, subdivision (a) or 269 (a)," offenses, it is apparent that it is referring to

the qualifying offenses only. Fourth, the allegation's use of the singular, as opposed to the plural, i.e., "an offense," refers to lewd and lascivious acts (§ 288, subd. (a)) or rape or sodomy (§ 269, § 261 or § 286), which are the crimes defendant was charged with in 27 counts. Thus, "an offense" refers to a single section of the Penal Code, not a single incident. In sum, we find defendant's argument unpersuasive.

V. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.